

Cannabis and the duty to accomodate

Understand and act

The what

In Canada, recreational cannabis use came into effect October 17, 2018, leaving logistics companies wondering how legalization will affect the commercial transportation industry.

Similar to the upcoming Electronic Logging Device Mandate, the legalization of cannabis is bringing further changes and will continue to do so for years to come. Since the inception of the Cannabis Act, uncertainty remains with respect to how legalization of marijuana will impact industry. Carriers who have decided to move cannabis have experienced significant growth.

Other employers continue to struggle with drug testing and employees utilizing cannabis for medicinal purposes.



Did You Know?

- 81% of employers believe the new legislation will have an Impact on their workplace
- 3/5 employers say they have adopted a policy on drug use

Recognize the signs of cannabis use or dependence

- Red or bloodshot eyes
- Personality changes or erratic behavior
- Working in an unsafe manner or involvement in an accident
- Consistent lateness, absenteeism, or reduced productivity or quality of work
- Exhaustion
- Increased appetite
- Failing a drug and alcohol test

What are we seeing?

One emerging issue is the use of medical cannabis as a prescribed form of treatment. There can be skepticism whether this use is legitimately related to a medical condition, or is recreational use masked as a disability-related need.



How should employers address employees medicinal or recreational use of cannabis?

Talk about it - When an employer observes changes in an employee's attendance, performance or behavior that may indicate possible substance dependence, it triggers the employer's legal obligation to initiate a discussion with the employee about the potential to accommodate a disability. This is called duty to inquire.

Gather and consider the relevant medical information - Employers need to know whether the employee has a disability and if so, what accommodations are required. Medical requests are allowed and will assist employers in making informed decisions about reasonable accommodation options. Keep in mind that requesting medical information for the accommodation process requires balancing the employers right to manage the workplace and the employees right to privacy. Medical requests must be limited to information related to the employee's duties and their accommodation needs. Focus on prognosis and not diagnosis.

Accommodate - An employee has the right to be accommodated to the point of undue hardship. This does not give the employee the right to their ideal or preferred accommodation. Accommodation must work for everyone. Examples of accommodations are: Changes to employees work schedule to allow for treatment, adjustments in hours or performance requirements to meet any needs set out in the medical assessment, re-assignment to a position that is not safety-sensitive or short or long-term sick leave. Develop an accommodation plan and save all requests, documents, meetings and discussions.

What is the duty to accommodate?

A legal requirement that employers identify and modify any regulation, practice, expectation or procedure that has or may have discriminatory consequences based on prohibited grounds of discrimination.

Employers have an obligation to accommodate - to the point of undue hardship - an employee who has identified as having a disease, injury or disability, including substance dependence and medical authorizations to use cannabis for medical purposes.

Duty to accommodate ends with undue hardship

- The duty to accommodate ends when an employer reaches a point of undue hardship. Under the Canadian Human Rights Act, an employer can only claim undue hardship when adjustments to a policy, practice, bylaw or physical space would cost too much -or - create health and safety risks.
- There is no standard formula for undue hardship. Each situation should be viewed as unique and assessed individually. It must be supported by facts, evidence and employers should be able to show all reasonable means of accommodation have been exhausted.
- Once undue hardship is demonstrated, and accommodations have been exhausted, the employer is no longer required to accommodate the employee.

Testing for impairment

- Employers must consider a variety of factors including human rights law, privacy, safety, labour standards, collective agreements, regulatory requirements, position duties and more
- Testing is permissible, depending on the nature and context of employment
- Using disciplinary action without initiating a conversation or failure to comply with the duty to accommodate may be contrary to the provisions of the Canadian Human Rights Act.



References

- <https://www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence>
- CRHA, How to adapt the workplace to the legalization of Cannabis, November 2017
- Canadian Human Rights Act (R.S.C., 1985, c. H-6)



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